IN THE HIGH COURT OF JUDICATURE AT BOMBAY
SIDE JURISDICTION
CRIMINAL APPLICATION NO.4602 OF 2006

Saquib Abdul Hamid Nachan ...Applicant.
V/s.
The State of Maharashtra ...Respondent.

Mr.Mubin Solkar, adv. for the Applicant.
Mr.U.V.Nikam, APP for the Respondent/State.

CORAM: J.H.BHATIA, J.
DATE : 9th March, 2007.

P.C.:

1. Heard Mr.Mubin Solkar, the learned counsel for the applicant and Mr.Nikam, the learned APP for the State.

2. Prosecution case in brief, is that on 28-1-2002 at about 3 p.m. advocate Suresh Baliram Sherekar, alongwith four other persons, was proceeding in his Santro car by Mumbai-Agra highway to go to Padgha. On the way two persons, who had covered their faces with black cloth, came on a motorcycle and one of them, who was sitting on the back seat, fired on Suresh Sherekar thrice. After that the assailants ran away by the said motorcycle towards Nashik. Sherekar was seriously injured and when he was taken to the hospital, he was declared dead. About this incident the report was lodged by one Nitin Mhatre, who was an eye witness and companion of Suhas Sherekar. On the basis of the report

Crime No.11 of 2003 came to be registered at police station Padgha for the offence punishable under Section 302 read with Section 34 of the I.P.C. and also under Sections 25 and 27 of the Arms Act. On 28-6-2002 investigation was taken over by the local crime branch Thane (Rural) but there was no progress in the investigation. Finally investigation of this case was handed over to DCB CID, Mumbai as per the directions given by the superior police authorities. The present applicant, who was already in custody in connection with the Bomb Blast case, was arrested in the present matter on 19-8-2003 and since then he is in custody. Admittedly, the Investigating Officer filed the charge-sheet of this case before the Metropolitan Magistrate, 37th Court, Mumbai on 15-11-2003, which was within 90 days from the date of arrest of the present applicant. On 9-12-2003 the Metropolitan Magistrate committed the case to the Court of Sessions at Mumbai. It appears that when the case was pending before the Additional Sessions Judge, Mumbai, the I.O. made an application before the said Additional Sessions Judge pointing out that the case pertains to Padgha police station but the charge-sheet was filed at Mumbai and as there was doubt as to which Court had jurisdiction, proceeding may be stayed till the question of jurisdiction was settled by the Principal Sessions

Judge, Mumbai. Application was accordingly made before the Principal Judge, City Civil Court, Mumbai, who after hearing the parties passed the order on 19-10-2005 holding that as the offence was committed within the territorial jurisdiction of J.M.F.C.Bhiwandi, charge-sheet should have been filed before him under Section 173 and not before the Metropolitan Magistrate at Mumbai. He held that the Metropolitan Magistrate Mumbai had no jurisdiction to take cognisance of the matter and therefore, the committal order passed by the said Metropolitan Magistrate on 9-12-2003 was also without jurisdiction. In view of this, he set aside the committal order and directed the Metropolitan Magistrate to return the charge-sheet to the I.O. for submitting the same before the J.M.F.C., Bhiwandi having jurisdiction. After communication of this order, the learned Metropolitan Magistrate on 19-12-2005 directed the I.O. to collect the charge-sheet and other papers from the Court. On 21st October, 2005, the charge-sheet and other relevant papers were actually collected by the I.O. from the Court of Metropolitan Magistrate and on 24-10-2005 he submitted the charge-sheet before the J.M.F.C.Bhiwandi.

3. According to the applicant as per the provisions of Section 173(2), the I.O. was required to

file police report or charge-sheet before the Magistrate empowered to take cognizance of the offence. It is contended that the I.O. was aware that the offence was committed within the limits of Padgha police station and the Magistrate empowered to take cognizance of the offence was J.M.F.C. Bhiwandi and not the Metropolitan Magistrate. In spite of this knowledge, he filed the charge-sheet before the Metropolitan Magistrate, who could not take cognizance of the matter as per the provisions of law. According to him, he was in custody in this matter from 19-8-2003 while, the charge-sheet was filed before the J.M.F.C.Bhiwandi on 24-10-2005. It shows that he was in custody for more than two years before filing of the charge-sheet. According to him on 26-9-2005 he submitted application for bail before the J.M.F.C.Bhiwandi under Section 167(2) on the ground that even though he was in custody for more than 90 days, charge-sheet was not filed as required under Section 173(2) and therefore, he is entitled to be released on bail. However, the learned J.M.F.C. rejected that application on 28-9-2005. After that the applicant filed an application for bail before the Sessions Court at Thane on 27-3-2006 on the same ground. That application came to be rejected on 13-11-2006. After that the present application is filed on the same ground.

4. The facts stated above reveal that the investigation was completed and the charge-sheet was also filed by the Investigating Officer within 90 days from the date of arrest. The charge-sheet should have been filed in view of the provision of Section 173(2) before the J.M.F.C., Bhiwandi being the Magistrate, who was empowered to take cognizance of the matter. However, it appears that the police officer committed error in filing the charge-sheet in the Court of Metropolitan Magistrate, Mumbai, instead of before the J.M.F.C. Bhiwandi. It appears that the investigating agency had moved the State Government seeking permission or direction under Section 185 for trial of this case at Mumbai. Admittedly, no decision was taken by the Government in this respect till the learned Sessions Judge, Mumbai passed the order directing the Metropolitan Magistrate to return the charge-sheet. It appears that the investigating agency was wrongly advised or misled by the authorities or officers, who might have instructed them, to file the charge-sheet before the Metropolitan Magistrate. Possibly this was because investigation of the case was taken over from Thane police and was transferred to investigating agency at Mumbai. The fact remains that the investigating agency had infact completed the investigation and filed

the charge-sheet within 90 days after the arrest of the accused. If the charge-sheet would have been submitted before the J.M.F.C., Bhiwandi and not before the Metropolitan Magistrate on 15-11-2003, the present applicant would not be entitled to claim any right of bail under Section 167(2) of the Cr.P.C. It is material to note that after his arrest or even after filing of the charge-sheet, the applicant never filed an application for bail under Section 439 of the Cr.P.C. On 26-9-2005, the Sessions Judge, on the application of prosecution itself, came to a conclusion that the charge-sheet should have been filed before the J.M.F.C., Bhiwandi and not before the Metropolitan Magistrate and he passed the appropriate order. The learned counsel for the applicant makes a statement that the application under Section 167(2) was filed before the J.M.F.C., Bhiwandi on 19-9-2005 that is about one week before the order was passed by the Sessions Judge possibly that order was passed in anticipation of the order that the Metropolitan Magistrate did not have jurisdiction. If the applicant felt that on merits he had good case to be released on bail, he could certainly file application for bail under Section 439 of the Cr.P.C. during the long period of about two years, after his arrest till the date on which he filed application under Section 167(2) of the Cr.P.C. As the charge-sheet was filed

before the Metropolitan Magistrate, he appears to have taken cognizance of the matter and committed the case on 9-12-2003. That means the learned Metropolitan Magistrate had committed the case within less than one month after the charge-sheet was filed. Committal of the case was within the knowledge of the accused but he did not move any application for bail.

5. Section 462 of the Code of Criminal Procedure provides that no finding, sentence or order of any Criminal Court shall be set aside merely on the ground that inquiry, trial or other proceedings in the course of which it was arrived at or passed, took place in a wrong sessions division, district, subdivision or other local area, unless it appears that such error has infact occasioned a failure of justice. It may further be noted that under Section 190 (1), the Magistrate of First Class may take cognizance of any offence-

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such

offence has been committed.

Section 460 provides that if any Magistrate not empowered by law to take cognizance of an offence under clause (a) or clause (b) of subsection (1) of section 190 erroneously in good faith takes the cognizance, his proceedings shall not be set aside merely on the ground of his not being so empowered. However, under Section 461, if the Magistrate not empowered to take cognizance, takes cognizance of an offence under Clause (c) of subsection (1) of section 190; his proceeding shall be void. In the present case, the Metropolitan Magistrate was not empowered to take cognizance of this case under Section 173(2) of the Cr.P.C. However, the offence was under Section 190(1)(b) that is upon a police report. Therefore, even though the Metropolitan Magistrate, not empowered by law to take cognizance of the offence, had taken that cognizance, still the proceeding before him is not vitiated under Section 460. Further, I find that such error had not infact occasioned failure of justice because as soon as the charge-sheet was filed, the applicant was entitled to move the concerned Sessions Court for bail under Section 439 of the Cr.P.C. However, he did not avail that right for which he can not blame anybody else.

6. From the facts stated above, it is clear that the investigating agency had completed the investigation and filed the charge-sheet within a period of 90 days. However, error was committed in filing the same before the Metropolitan Magistrate in stead of before the J.M.F.C.,Bhiwandi. In view of Section 460 it was only irregularity, which does not vitiate the proceeding before the Magistrate in view of provisions of section 460. When the question of jurisdiction was raised , the learned Sessions Judge rightly corrected the mistake and directed the charge-sheet to be filed before J.M.F.C.,Bhiwandi. Merely by filing the charge-sheet before the Magistrate not empowered to take cognizance, right or opportunity given to the applicant to file application for bail under Section 439 was not taken away. In view of all the circumstances, I find that this application under Section 167(2) of the Cr.P.C. is not tenable and the application is liable to be dismissed.

7. Application stands dismissed.

(J.H.Bhatia,J.)